IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 78 of 1999

in

SPECIAL CIVIL APPLICATIONNo 7137 of 1998

with
CIVIL APPLICATION NO. 164 OF 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANAGING DIRECTOR

Versus

KALVIR

Appearance:
MR K.G.Vakharia, Sr.advo.with SAMIR U SHAH for Appellant
MR JC VYAS for Respondent No. 1
RULE SERVED for Respondent No. 2

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and

MR.JUSTICE C.K.THAKKAR

Date of decision: /03/2000

CAV JUDGEMENT

Per Thakker, J:

This appeal is filed by Gujarat Pipavav Port Limited against Kalvir through its proprietor Kantilal Vithaldas Patel,original petitioner against the judgment and order passed by the learned Single Judge in SCA No. 7137 of 1998 decided on October 16, 1998.

The first respondent-original petitioner, applied for allotment of a plot for ship breaking for a total amount of Rs. 7 lacs. Receipts were issued in favour of the petitioner by the Port Authorities. It was the case of the petitoner that since possession of the plot was not handed over to him for a long period, in June 1998, he addressed a letter requesting Pipavav Port to refund the amount paid by him with interest. Request was, however, not responded nor payment was made and hence, he issued a notice through his advocate on July 15, 1998. In spite of notice,no payment was made and the petitioner had to approach this court by filing the above petition.

The matter was placed before the learned Single Judge , who vide a judgment impugned in this appeal, directed Pipavav Port to refund the amount of Rs. 5 lac to the petitioner without interest. It was inter alia contended in the affidavit in reply filed by Dilip Mehta, Manager of Pipavav Port Limited that a sum of Rs 5 lacs was refundable to the petitioner and that too without interest, and not Rs 7 lacs, as asserted by the petitioner. The learned Single Judge observed in the impugned judgment that he had ascertained from the learned advocate appearing for Pipavav Port Limited that there was no dispute with regard to amount of Rs 5 lacs being refundable without interest to the petitioner and as the Port Authority was an instrumentality of Sate, it was not justified in not refunding the said amount. Accordingly, the petition was partly allowed. Learned Single Judge has further observed that bearing in mind the fact that the Port Authority was to refund amount of money (Rs. 5 lacs), the petitioner would have to pay court fees on the said amount. He,therefore, ordered that amount of court fees shall be deducted from the amount payable to the petitioner. It is this order which is challenged in the present appeal.

We have heard Mr. K.G. Vakharia, learned senior advocate with Mr. Samir Shah for the appellant and Mr. J.C. Vyas, learned advocate for the petitioner.

Mr. Vakharia contended that the learned Single Judge has committed an error of law and of jurisdiction in virtually passing a money decree in a petition filed under Article 226 of the Constitution . He submitted that the learned Single Judge was also not right in observing that there was no dispute regarding the amount refundable to the petitioner to the extent of Rs. 5 lacs without interest. Drawing our attention to affidavit in reply filed by the Manager of the appellant Port, he submitted that several contentions were raised by the appellant.It was contended by the appellant that the petitioner was not interested in carrying out ship breaking activities. But only with a view to back out from occupying plot and to get the amount of refund, the petitioner had approached this court by invoking extraordinary jurisdiction under Article 226 of the Constitution . It was the case of the appellant that there was breach of agreement by the petitioner and such question can be dealt with and decided only by a civil court having jurisdiction to entertain a suit and it cannot be made subject matter of petition under Article 226 of the Constitution. It was alternatively contended that even if the court comes to the conclusion that there was no breach of agreement by the petitioner and he would be entitled to refund, such amount would be Rs 5 lacs and that too without interest. Such submission cannot be considered and treated as admission or consent on the part of the appellant and in passing money decree in favour of the petitioner by directing the appellant to pay Rs. 5 lacs and to the petitioner to pay court fees on that basis. Such order would be without jurisdiction and deserves to be quashed and set aside.

Mr. Vyas for the first respondent original petitioner, on the other hand, submitted that the order was a consent order though it was not specifically stated in the judgment rendered by the learned Single Judge. He submitted that after considering the affidavit in reply and the fact that undisputed amount was Rs 5 lacs, an order was passed by the learned Single Judge which was proper and equitable. The learned Single Judge was aware of the fact that he was directing the appellant to refund the amount of Rs 5 lacs and hence, the petitioner had shown his bona fides and readiness and willingness to pay court fees on the refundable amount and in fact, the petitioner has paid court fees. He, therefore, submitted

that LPA deserves to be dismissed.

In the facts and circumstances of the case, in our opinion, LPA deserves to be allowed. So far as consent of the learned counsel for the Port Authority is concerned, it is nowhere stated in the judgment of the learned Single Judge that with consent of the parties, the order was passed allowing the petition. But in our opinion, the contention of the learned counsel for the appellant is well founded that in such cases, even with the consent of parties, the court cannot ignore and unmindful of the power to be exercised under Article 226 of the Constitution. Jurisdiction of this Court under Article 226 of the Constitution is extraordinary in nature and this Court cannot be substituted for a civil court exercising power under the Code of Civil Procedure, 1908 of passing decree in favour of plaintiff. We must confess that we are impressed by the submission of the learned advocate for the appellant that virtually, by directing the Port Authority to refund the amount of Rs 5 lacs to the petitioner and by directing the petitioner to pay court fees on that amount, the learned Single Judge has exercised powers of a civil court which could not have been done. All the questions which which are raised by both the parties could be gone into and decided by a regular civil court and not by writ court exercising extraordinary jurisdiction under Article 226 of the Constitution, even with consent of the parties.

For the foregoing reasons, in our opinion, LPA deserves to be allowed and is accordingly allowed. Judgment and order of the learned Single Judge is hereby set aside. The matter will have to be remanded to the learned Single Judge taking up such matters to decide it in accordance with law. If any amount is paid by the petitioner towards court fees, the same will be refunded to him. We may observe that as we have not considered the merits of the matter, all observations made by us hereinabove would be treated as limited for deciding the legality of the order passed by the learned Single Judge, and as and when the matter will be placed before the learned Single Judge, he will decide the same on its own merits. LPA is accordingly allowed. No order as to costs. No order on civil application.

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parekh